

TRANSGENDER SERVICE IN THE UNITED STATES ARMED FORCES:
A POLICY PROPOSAL FOR PERMANENT CHANGE

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ABSTRACT

The United States armed forces do not permit new accessions to be transgender. The current policy is administrative in nature, and is not rooted in statutory authority.

Permanent change cannot occur in the absence of Article III judicial authority. The force of Supreme Court case law would permit the entry of transgender personnel into the armed forces, and would ensure a sustainable legal path to transgender service. Such a path requires an extended commitment of time and resources by a litigant. Moreover, the likelihood of a case being heard by the Supreme Court is exceedingly low, and there is no guarantee of success even if writ of certiorari is granted. Additionally, an Article III solution to the problem requires patience by members of Congress. In the current political climate, there is little chance that any American politician would commit to a long-term solution rather than risk an administrative solution that is immediate.

Modifying the administrative policies to allow for transgender service is the most convenient and effective solution to overcome the problem even though administrative modifications can easily be reversed by future administrations.

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Memorandum to President Barack Obama

From Michael E. Jones

ACTION-FORCING EVENT

On 28 July 2015, Secretary of Defense (SECDEF) Ash Carter issued a memorandum that withheld the military departments' authority to involuntarily separate those service members already on active or reserve service.¹ The memorandum also withheld the authority to deny reenlistment or continuation of service based on a service member's gender identity, making the Under Secretary of Defense for Personnel and Readiness the sole authority to deviate from SECDEF's general prohibition. In addition to the temporary change to separation authority for transgender service members, SECDEF also directed the military departments to create working groups to consider how to implement the Secretary's plan to permit open transgender service. Recommendations from the working groups were due within six months from the date of the memorandum and they will provide SECDEF with crucial feedback from the military departments relating to legal and practical barriers that may impede SECDEF from implementing his desired policy of allowing transgender people to serve in the armed forces.

STATEMENT OF THE PROBLEM

Unlike their heterosexual and homosexual counterparts, transgender citizens are prohibited from serving openly in the armed forces of the United States. Such disparate treatment infringes on their constitutional rights, is contrary to the law and policy governing federal employment standards, and causes diminished access to health care

¹ Ash Carter, Secretary of Defense. Memorandum for the Secretaries of the Military Departments; Transgender Service Members (28 July 2015).

services through the Veterans Administration among transgender veterans.² With an estimated 15,000 transgender personnel currently serving and another nearly 135,000 veterans and retirees, the current policy adversely impacts tens of thousands of Americans who desire to serve their country.³

The Department of Justice (DOJ) opined by memorandum on 15 December 2014 that Title VII of the Civil Rights Act of 1964 included gender identity as a form of sex discrimination and should be prohibited.⁴ The Attorney General's reading of Title VII and existing case law at the time the memorandum was issued turned on its interpretation of Congress' implied intent with respect to the court's opinion in the *Price Waterhouse* case.⁵ The court held that Title VII's use of the phrase "because of..." an employer relying on sex-based considerations when taking action against an employee, discrimination could be based on an employee's transitioning to, or identifying as, a different sex altogether. The Attorney General described the purpose of the memorandum to be one of encouraging "consistent treatment of claimants throughout the government." This position, though not intended to influence active litigation in related cases, was a clear signal to federal agencies, including the armed forces as branch of the Executive, that the nation's top prosecutor would be treating transgender discrimination

² Jack Harrison-Quintana and Jody Herman. Still Serving in Silence: Transgender Service Members and Veterans in the National Transgender Discrimination Survey. LGBTQ Policy Journal at the Harvard Kennedy School, Vol. 3, 2012-3, available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Harrison-Quintana-Herman-LGBTQ-Policy-Journal-2013.pdf>.

³ Gary Gates and Jody Herman. Transgender Military Service in the United States. Williams Institute (May 2014); available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf>.

⁴ Department of Justice Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, Dec. 15, 2014.

⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-2 (1989).

claims consistently by pursuing litigation against employers who engage in discrimination based on transgender status.

Department of Defense Instruction (DoDI) 6130.03 permits the military departments of the armed forces to discharge from active or reserve service all service members with a, “...history of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias.”⁶ Each military department is delegated the authority to issue its own instructions to carry out the authorities under DoDI 6130.03 in addition to permitting waivers that allow service members to continue in service in spite of the inability to meet medical standards under DoDI 6130.03.

The Equal Employment Opportunity Commission recently reversed an administrative appeal filed by a transgender female who alleged disparate treatment and harassment based on the Department of the Army’s refusal to allow her use of the female restroom at her federal workplace during and after her transition from a male to a female.⁷ As the regulatory agency for all federal facilities, the Occupational Safety and Health Administration (OSHA) sets the standards for all federal workplace facilities. OSHA’s core principle with respect to bathroom facilities is that “all employees, including

⁶ Department of Defense Instruction 6130.03, dated 28 April 2010 (Change 1, 13 September 2011), Enclosure 4, Sec. 29.r. This instruction sets the medical standards for members of the armed forces and permits each branch of service to implement the standards in accordance with the respective service’s needs.

⁷ Lusardi v. McHugh, EEOC Appeal No. 0120133395 (1 April 2015), available at: <http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf>.

transgender employees, should have access to restrooms that correspond to their gender identity.”⁸

President Obama’s position is codified at Executive Order 13672, amending Executive Orders 11246 and 11478. Pursuant to his Executive authority, the president expanded the applicability of nondiscrimination in government employment from sex or national origin to sex, sexual orientation, *gender identity*, or national origin.⁹ (emphasis added) Transgender people are effectively part of a protected class of people now with respect to federal employment.

In short, there is a disconnect between the Executive’s intent to refrain from discriminating against transgender federal employees and the authority the military departments previously held to discharge transgender service members based exclusively on their status as transgender. As the Commander in Chief of the armed forces, the president’s expressed intent should be realized as quickly as possible through timely implementation of policy changes that permit transgender people to openly serve alongside their fellow Soldiers, Airmen, Sailors, and Marines.

HISTORY

There are three things that brought the problem stated above into the forefront. First, the repeal of the “Don’t Ask, Don’t Tell” policy in 2011 excluded transgender service members, leaving that class of people subject to discharge for remaining openly

⁸ OSHA Best Practices Publication 3795-2015, A Guide to Restroom Access for Transgender Workers (2015). Available at: <https://www.osha.gov/Publications/OSHA3795.pdf>.

⁹ Executive Order 13672 dated 21 July 2014. Federal Register, Vol. 79, No. 141; available at: <https://www.federalregister.gov/articles/2014/07/23/2014-17522/further-amendments-to-executive-order-11478-equal-employment-opportunity-in-the-federal-government>.

transgender. Second, the Diagnostic Statistical Manual of Mental Disorders, Fifth Edition (DSM 5) places transgenderism in a category of mental disorders which makes transgender service members susceptible to discharge from service in the armed forces for medical or mental health reasons. Third, the urgent nature of addressing the problem of how to handle assimilating transgender service members is rooted in the confusion that surrounds use of restroom facilities by transgender service members coupled with the limited ability for different branches of the armed forces to accommodate more than two types of facilities in various platforms of aircraft, vessels, and in deployed settings.

“DON’T ASK, DON’T TELL”

In 1993, then-President Clinton reached a compromise with opponents to removing barriers for homosexuals to openly serve in the armed forces. Under Public Law 103-160, codified at 10 U.S.C. § 654, homosexuals were permitted to enter or continue service in the armed forces provided they did not: a) engage or attempt to engage in homosexual acts¹⁰; b) disclose that they were either homosexuals or bisexuals; or c) marry or attempt to marry another person of the same sex.¹¹ Separate and distinct from sexual orientation, homosexual conduct was an objective criterion that could be readily identified through any of the three aforementioned manifestations, none of which included mere sexual orientation without an expression of intent to commit a homosexual

¹⁰ Department of Defense Directive 1304.26, para. E1.2.8.2.1.4.1. Dec. 21, 1993, incorporating Change 1, Mar. 4, 1994. A homosexual act is defined as, “Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and...Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act [thereof].”

¹¹ Burrelli, Peter F. *The Repeal of “Don’t Ask Don’t Tell”: Issues for Congress*. Congressional Research Service, Report R42003, Dec. 21, 2012; available at: <https://www.fas.org/sgp/crs/misc/R42003.pdf> (last visited Mar. 5, 2016).

act or at least tell someone about being a homosexual. The new policy became part of the law by incorporation through the National Defense Authorization Act of 1994. Enactment of the law required implementing regulation by the DOD which was accomplished through Department of Defense Directive (DODD) 1304.26.

Released in December of 1993 and revised in March of 1994, DODD 1304.26 implemented President Clinton's "Don't Ask, Don't Tell" policy by instructing each branch of service to follow specific guidance when recruiting and retaining its service members. First, the regulation prohibited the branches from asking potential recruits whether they were heterosexual, homosexual, or bisexual.¹² Absent from the directive is the question of how to handle transgender applicants and personnel. This is so because the law and regulation focused on acts and conduct rather than how personnel characterized themselves or what their proclivities were for sexual preference. Specifically, the directive stated, "A person's sexual orientation is considered a personal and private matter, and is not a bar to service entry or continued service."¹³ Second, the regulation provided two important exceptions that permitted the services to induct new applicants. If the service determined that an applicant stated that he or she was a homosexual, engaged in homosexual acts, or married or attempted to marry a person of the same sex for the purpose of avoiding military service, the service could disregard the non-conforming statements or acts and permit the person's entry into service.¹⁴ Additionally, and most importantly, DODD 1304.26 allowed the service to induct a new

¹² *Supra* note 10 at para. E1.2.8.1.

¹³ *Supra*, note 10.

¹⁴ *Supra*, note 10 at E1.2.8.4.1.

applicant where rejection would not be in the best interests of the armed force.¹⁵

Surprisingly, there is very little discussion about how the armed forces could have avoided the application of DODD 1304.26—perhaps because of the common belief that it was unlikely that the DOD and the service branches would exercise such a liberal option to permit the entry of homosexual service members. Nonetheless, the services were given the ability to effectively make their own policy with respect to the induction of new applicants even if their hands were tied with respect to continued service of existing service members.

The status of transgender service members and inductees was not addressed in the DODD 1304.26 because it was the person's *conduct* rather than his or her *gender* that determined the degree to which one may be subjected to separation procedures or rejection from induction to a service. To the extent that a transgender male to female (MTF) service member carried on a relationship with a female, there was no prohibition for such conduct provided the MTF service member did not undergo medical transition, replacing male genitalia with female genitalia. Instead, transgender service members were separated based on the premise that they had a mental health condition that precluded service in the armed forces. In other words, transgender personnel were determined to be mentally ill rather physically unqualified to enter or continue service in the armed forces. Therefore, the exclusion of transgender as a category under the “Don’t Ask, Don’t Tell” framework is not inconsistent with the treatment of transgender persons under the mental health qualifications of DODI 6130.03. The American Psychological

¹⁵ *Supra*, note 10 at E1.2.8.4.2.

Association and its support of the DSM-5, discussed below, support the proposition that transgenderism is a mental health disorder.

DSM-5

When DSM-5 was published, it included a modified version of what constituted a transgender condition. Because the American Psychological Association (APA) did not want anyone with a gender identity issue to be stigmatized in society or in the medical profession, the APA revised what it previously termed “gender identity disorder” to “gender dysphoria.”¹⁶ Dysphoria is defined by one online medical dictionary as a mood of general dissatisfaction, restlessness, depression, and anxiety; a feeling of unpleasantness or discomfort.¹⁷ As applied, the definition of dysphoria is connected to one’s gender as assigned at birth. In conjunction with the criteria of the condition noted below, anyone who desires to be a gender other than the one assigned at birth is per se dysphoric and, therefore, in need of treatment or entitled to treatment by the medical or mental health community of professionals.

In order to be diagnosed with gender dysphoria, at least two of the following conditions must be met: 1) a marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics; 2) strong desire to be rid of one’s primary and/or secondary sex characteristics; 3) a strong desire for the primary and/or secondary sex characteristics of the other gender; 4) a strong desire to be of the

¹⁶ American Psychological Association, Gender Dysphoria Fact Sheet (2013), available at: <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf> (last visited Mar. 6, 2016).

¹⁷ mediLexicon, available at: <http://www.medilexicon.com/medicaldictionary.php?t=27367> (last visited Mar. 6, 2016).

other gender; 5) a strong desire to be treated as the other gender; or 6) a strong conviction that one has the typical feelings and reactions of the other gender.¹⁸ Of particular importance in these criteria is the presence of the phrases “strong desire” and “strong conviction.” This connotes the fact that a proper diagnosis depends solely on whether the patient believes that he or she is a different gender or wants to be identified as a different gender from the one assigned at birth. A mere sex change operation without an accompanying desire to be of the other gender or to be treated as a member of the other gender negates the possibility that one could be gender dysphoric because a sex change operation only satisfies one of the necessary criteria. A corresponding desire or conviction to be of the other gender is also required.

DESCRIPTION OF POLICY PROPOSAL

Presidential action can achieve the policy goal of permitting transgender and transitioning transgender individuals to serve in the armed forces of the United States. The present bar to service of such individuals is a combination of medical and mental health standards that are administrative in nature. As Executive branch agencies, the Services of the armed forces can be directed by the President or Secretary of Defense to modify their administrative regulations to allow transgender individuals to serve openly in the armed forces. The challenge in making administrative changes is that each new Executive administration can make the same modifications to Service regulations. Therefore, legal precedent through the Judiciary is also required to recognize transgender individuals as a protected class of people who are capable of being considered for service

¹⁸ American Psychiatric Association, What is Gender Dysphoria, available at: <http://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited Mar. 6, 2016).

in the armed forces. This two-pronged approach of modifying regulatory barriers to service of transgender individuals, combined with the force of legal precedent through judicial recognition of transgenders as a protected class of people can lay the foundation for lasting authority that will sustain over future Executive administrations. If transgenders are included as protected classes of people that must be recognized as such by the armed forces, this will give transgenders an entitlement to compete for service in the armed forces because the federal government will not be able to exclude transgenders on a per se basis any more than the armed forces could rely on race, color, national origin, or gender as a basis to deny entry.

Policy Authorization Tool

The primary policy authorization tool to effect lasting policy change is legal precedent as developed by Article III judicial authority. Specifically, the Supreme Court must agree to hear, and then decide a case involving transgender rights in the military. There is no express protection afforded to transgender individuals in the Constitution of the United States. The Equal Protection clause of the Fourteenth Amendment is widely established as the vehicle to afford classes of persons recognized by the law and the courts as requiring more equal treatment in areas such as employment and social benefits.

The Civil Rights Act of 1964 laid the statutory framework for establishing protected classes of people.¹⁹ The Act prohibited unlawful discrimination against employees by employers by carving out classes of people who are entitled to such protection. Race, color, religion, sex, and national origin are the protected classes. The constitutional basis

¹⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

for this position is rooted in the Fourteenth Amendment of the United States Constitution, which states, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²⁰ To date, sex has not been interpreted by the Supreme Court to include gender identity. Moreover, the Civil Rights Act excludes the United States or any agency thereunder from the definition of employer.²¹

Transgenders are left without the special protections afforded to those against whom employers exercise unlawful discrimination due to race, color, religion, sex, and national origin.

The next generation of civil rights legislation is represented in the Employment Non-Discrimination Act (ENDA) that most recently passed the Senate in 2013.²² It prohibits unlawful discrimination in employment practices based on sexual orientation and gender identity, actual or perceived. As far reaching as this legislation is, it does not afford any protections to members of the armed forces.²³ Additionally, it failed to muster sufficient support to pass the House.

Absent specific legislation that applies equally to members of the armed forces, the most definitive way to establish transgender rights within the armed forces is to present the right case with an appropriate fact pattern to the Supreme Court. If the Supreme

²⁰ U.S. Const. amend. XIV, sec. 1.

²¹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(b).

²² Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

²³ *Id.*, Sec. 7.

Court were to read transgender rights into the Fourteenth Amendment, it would establish the legal underpinning for service of transgender individuals in the Services. Case law alone, however, is insufficient to support the introduction of transgenders in the Services. Implementing regulations among the Services are also required because of the existence of administrative barriers that prevent transgender individuals from serving in the armed forces. This leads to the secondary policy authorization tool required—regulatory revision.

As discussed previously, DoDI 6130.03 permits the release from active-duty service all service members with a, “...history of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias.”²⁴ Additionally, the Services will not retain personnel who are diagnosed with gender dysphoria, as defined in DSM-V. The DoD and the Services will need to review their medical and mental health criteria and determine what, if any, disqualifying conditions will need to be removed, modified, or conditioned so that active-duty service becomes possible for transgender individuals.

The Services are drastically different in their missions and their resource requirements. Moreover, there are certain realities about the nature of the environment in which personnel serve that may preclude medical or mental health conditions, regardless of whether the person is unsuitable as a result on transgenderism or not. For example, consider sickle cell disease. Unabated sickle cell disease is a service-disqualifying condition.²⁵ According to the National Institute of Health, sickle cell disease occurs

²⁴ *Supra*, note 6.

²⁵ *Supra*, note 6 at sec. 23.

predominantly in people of African origin or those who identify themselves as black.²⁶ If an employer were to discriminate against black applicants because of their color, protection would be afforded because the employment practice is based on race. On the other hand, if an employer refused to hire a black person because he had sickle cell disease, there would be no such protection for the applicant, provided the employer had a legitimate reason for such a policy that is based on safety concerns or other legitimate employer interests. Here, too, the armed forces have legitimate interests in controlling new entrants to service based on medical or mental health conditions that would prevent an individual from being worldwide deployable.

SECDEF gave the Services a year to figure out how to make his abrupt policy change supportable.²⁷ That is not likely to be sufficient time to make the necessary modifications within each Service because of the numerous areas and agencies affected by the policy change. This policy proposal contemplates a three-pronged assessment process. First, each Service need to review medical standards. The Army will need to modify its medical intake processing at Military Entrance Processing Stations (MEPS) as they are responsible for medical clearance of all individuals recruited to all Services. Second, beyond refining the medical standards and mechanical processing of new entrants, each Service will need to review its facilities requirements ashore, at sea, and overseas. As discussed in the statement of the problem, the issue of restroom facilities is highly controversial. To adequately support lasting changes that allow transgenders to

²⁶ National Institutes of Health: National Heart, Lung, and Blood Institute, available at: <https://www.nhlbi.nih.gov/health/health-topics/topics/sca/atrisk> (last visited 1 Dec. 2017)

²⁷ *Supra*, note 1.

serve in the armed forces, each Service will have to consider how that basic need will be satisfied based on existing resources and any facilities or equipment limitations. Third, each Service must review which job specialties will and will not be able to assimilate transgender individuals based on physical limitations and mental health considerations. Each job in the armed forces makes different demands on the individuals who perform those jobs. There may be practical limitations to transgender service in all occupational specialties in the armed forces.

Policy Implementation Tool

It is difficult to imagine how a carrot-and-stick approach would work if the federal government were to impose it on itself. Carrots and sticks are typically used to incentivize individuals to take action or refrain from taking action that the government deems desirable based on its own policy objectives. A cabinet-level agency and its subordinate agencies are not likely to act or refrain from acting in response to the carrot-and-stick approach. As an instrument of foreign policy, the armed forces will conform to any policy goal established by the President and his SECDEF. Compliance is the cornerstone of military principles. If a Service attempted to opt out of compliance with a SECDEF directive, there would be a substantial threat to good order and discipline in the armed forces. Therefore, action or inaction does not require use of carrots.

Sticks, however, can still be effective to ensure complete compliance by each Service with the full spirit and intent of the policy. An effective use of sticks would be regulatory enforcement through budgetary constraints if non-compliance became an issue. Specifically, Congress could withhold certain appropriations by writing conditions into

the National Defense Authorization Act (NDAA). The most effective stick would be to make funding for specific authorizations such as tank building, ship construction, missile defense systems, or other specifically funded projects contingent on each Service allowing transgenders to serve. This would be the most severe form of enforcement because congressional involvement could result in swift and lasting change, causing a Service to experience financial anemia while Congress negotiated a resolution with the President. Yet, targeting specific funding or projects instead of reducing the general operations and maintenance funds by a percentage would force the Services to potentially choose program funding for certain projects over transgender service.

Another possibility is extending regulatory control of Service funding for man, train, and equip functions to SECDEF. Normally, the NDAA will provide direct appropriations to each Service or Military Department. Through the exercise of appropriate regulatory functions, SECDEF could exert some authority in this area if a Service did not comply fully with the transition to a modified regulatory framework that allows transgender service in the armed forces. This may require a change in the canned language Congress uses when appropriating funds to each Service, permitting the withholding of certain funding at the SECDEF level based on his implementing regulations. To be sure, this could cause significant discord among the Services as their identities are predicated on a certain level of fiscal autonomy.

The most important policy implementation tool will be in the use of appropriate sermons. Proper messaging to the all-volunteer forces is crucial. The introduction of transgender individuals in military service is akin to “Don’t Ask, Don’t Tell” in that it represents a milestone in the official inclusion of a class of people who may not be

widely or socially accepted. There must be active engagement within the Services by appropriate leadership for those already in service while concurrently engaging the American public to ensure that prospective recruits appreciate why the Services accept transgender individuals in the armed forces. A bilateral approach to indoctrinating current service members and informing prospective recruits will provide the Services the best opportunity to continue recruiting the best available entrants into the armed forces. Considering the size of the DoD budget, internal and public media campaigns should be tailored to minimize the fiscal impact of information operations against the Services' budgets. Alternatively, the Office of the Secretary of Defense (OSD) could utilize its existing public affairs office to develop and disseminate internal communications while employing an outside contractor to consult on messaging to the general public. It is difficult to gauge what the cost of these campaigns would be, but it is safe to assume that the fiscal impact would be in the low millions of dollars.

POLICY ANALYSIS

When weighing the benefits and impediments to implementing the policy outlined above, it is important to recognize that the two-pronged implementation could take place in either order and produce distinctly different results. There are impacts to effectiveness, efficiency, and administrative capacity of the proposal, depending on which prong becomes effective first. A brief overview of the general benefits and impediments of each prong is warranted to illustrate. This portion of the discussion does not address the order in which each prong becomes effective. The following two subsections address the benefits and impediments of the two-pronged implementation of

the policy proposal only. Collateral effects of implementation such as reconfiguring restroom facilities or modifying warships are discussed separately in other sections.

General benefits and impediments of Article III action

Benefits of the Supreme Court deciding the constitutional question of transgender rights to serve in the armed forces include the primacy and sustaining nature of the resulting authority. As the constitutional interpreters of the United States, the Supreme Court has the power to cause social and political change by interpreting the intent of the Constitution. Enacting statutes might be an alternative method to achieving the same end state, but statutes are equally susceptible to injunctive relief, and they are consequently subject to interpretation by the Judicial Branch if the laws are not well drafted or turn on questionable constitutional bases. Another benefit is that direction and guidance for the implementing regulations among the Services could become much more clear once the constitutional question of transgender rights in the armed forces is answered. Lastly, the only cost associated with a Supreme Court ruling is the litigation cost to the agency or Service that is required to defend against the action.

Impediments to Judicial Branch action include the amount of time it takes to litigate a case to the point when a writ of certiorari can be submitted. Even then, there is no guarantee that the Supreme Court will agree to hear the case. As of 30 June 2015, the Supreme Court granted certiorari for less than one percent of the new cases it received.²⁸ It could take years for a case that originates in the lower federal courts to make its way to

²⁸ Journal of the Supreme Court of the United States, October 2014 Term, available at: <https://www.supremecourt.gov/orders/journal/jnl14.pdf>. The latest Journal that contains statistics for docketed cases indicates that 68 cases out of 7,033 were granted writ of certiorari.

the Supreme Court. If the facts of the case are either not of interest or if the court considers the matter to be well settled, the court may decide against hearing the case. Another impediment is the cost of litigation for the complainant. Unless the complainant is prepared to spend well over one hundred thousand dollars in litigation costs, he or she will have to find a civil rights group or some other pro bono resource to argue the case at a reduced rate or for no cost.²⁹ One of the collateral impacts to implementation could be a heavy administrative burden to modify medical and mental health standards quickly in response to a Supreme Court decision. If unprepared for an unfavorable decision, the Services run the risk of failing to implement administrative changes rapidly. Additional litigation could ensue if the administrative modifications take an excessive amount of time and prospective recruits continue to be barred from entrance into service.

General benefits and impediments of regulatory action at the Service level

One of the biggest benefits of the policy proposal is the simplicity that results from Article III action. Once a decision is made in favor of allowing transgender service in the armed forces, regulatory implementation should be straightforward. A Supreme Court decision is likely to contain general guidance and criteria that supports regulatory implementation within the Services. Knowing that the Services must comply with a decision by the Judicial Branch provides clarity in whether or not to act in a timely manner. Another benefit is that there is little cost other than an anticipated contract for media services mentioned above. Even the cost of litigation to the Services is likely to be

²⁹ Adrienne Hill, How Much Does a Big Supreme Court Case Like Gay Marriage Cost? March 25, 2013, available at: <https://www.marketplace.org/2013/03/25/economy/how-much-does-big-supreme-court-case-gay-marriage-cost> (last visited November 11, 2017). According to one attorney who has argued several cases at the Supreme Court, the minimum cost of attorneys fees is \$100,000, ranging up to \$250,000. If certiorari is granted, the minimum cost can start at \$250,000.

minimized because in-house counsel would argue the case. The human resource costs will not be low, but they are not likely to be new costs that have to be paid out of pocket because the personnel responsible for defending litigation are already employed by the federal government either within the Services or by DOJ.³⁰

One of the largest impediments to the policy proposal is the time it may take for all Services to implement their respective regulatory modifications and other administrative changes. To promote consistency among the Services, SECDEF is likely to provide guidance at the DoD level that each Service must follow. It could take three to twelve months for SECDEF to consider regulatory and administrative impacts to the Services and provide clear guidance, depending on the level of complexity as held by the Supreme Court. In turn, the Services will be forced to adopt SECDEF's guidance or tailor their own regulatory provisions for their unique needs. It is not uncommon, though, for Services to adopt the SECDEF approach as an interim measure until the Service has additional time to consider collateral matters at their respective levels.³¹ Another impediment at the Service level is the potential for "one size fits all" guidance to create logistics barriers to implementation. For example, ambiguous guidance that directs the Services to create new restroom facilities for all facilities or workspaces could create

³⁰ For example, the Office of the Judge Advocate General of the Navy (Code 14) handles general litigation and defends claims made against the Department of the Navy. "The General Litigation Division defends Navy and Marine Corps commanders, policy makers, and service members in Federal and State civil litigation related to areas of division expertise. This support includes actual conduct of litigation, litigation support to Department of Justice attorneys and coordination with other agencies." Excerpt from the Navy JAG Corps's web site, available at: http://www.jag.navy.mil/organization/code_14.htm (last visited Nov. 11, 2017).

³¹ To illustrate, SECDEF published a memorandum for the implementation of fourth generation conference guidance on June 26, 2016. Until that point, the Department of the Navy (DoN) followed SECDEF's second generation conference guidance. The DoN never implemented SECDEF's third generation guidance until after the memo announced the fourth generation. See ALNAV 046/16 of Jun 27, 2016. The DoN finally implemented and is still using SECDEF's third generation conference guidance even though the subsequent update was released nearly 18 months ago.

significant costs. Forcing the Navy to create new spaces in submarines where space is already limited could change or limit the capabilities of the ship itself, whereas the Air Force may not have an issue with designating restroom facilities in its aircraft. These modifications could be costly and they could adversely affect that functionality of the equipment.

Which first—case law or regulation?

The order in which the proposed policy tools become effective can have a substantial effect on human and fiscal resources within the DoD in addition to the practical considerations of advancing a case to the Supreme Court. The nature of the policy authorization tool is such that a prospective entrant into military service will have to raise a justiciable claim against the government that is ripe for litigation. As defined by Black's Law dictionary, ripeness is, "[A] constitutional mandate of case or controversy, U.S. Const. Art. III, requir[ing] an appellate court to consider whether a case has matured or ripened into a controversy worthy of adjudication before it will determine the same."³² Theoretical harm is not justiciable, so the right litigant will have to present himself at the right time and litigate a case originating from the lower courts. This takes a significant amount of time. A claim against the government will turn on the basis for an applicant to military service to be denied entrance. Therefore, if the administrative policies and

³² Black, Henry. Black's Law Dictionary, 1979, 5th ed. The definition further fleshes out the doctrine as follows, "Basic rationale of 'ripeness doctrine' arising out of courts' reluctance to apply declaratory judgment and injunctive remedies unless administrative determinations arise in context of a controversy ripe for judicial resolution, is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties..."

regulations preclude transgender service, it should not take long for civil rights action groups to locate a willing litigant who has been denied entrance into the military.

Alternatively, modifying the administrative regulations as a first step could change the legal landscape significantly. As previously discussed, transgenderism is not expressly prohibited as a condition that bars entrance into military service. It is, however, characterized as gender dysphoria in DSM-V. It is that mental health condition that causes the Services to reject applicants. At present, transgender individuals may request a waiver to remain in service, but there is no mechanism to permit the entry of accessions into service. Data regarding the number of waivers requested by transgender personnel already serving in the armed forces or those who aspire to transition to transgender is not publicly available; therefore, there is no underlying assumption about how many transgender individuals desire to enter military service as accessions.³³ Estimates of current transgender personnel range between 15,500 on the high end³⁴ and 2,150 on the low end.³⁵ A RAND Corporation study, commissioned by the Obama administration, arrived at an estimate of 3,960 transgender personnel serving in the Active Component or

³³ Bloomberg News, “Here’s How Many People Serve in the U.S. Military,” (July 26, 2017), available at: <https://www.bloomberg.com/news/articles/2017-07-26/here-s-how-many-trans-people-serve-in-the-u-s-military> (last visited Nov. 12, 2017) According to the article, “There is little concrete data on how many trans people serve in the military, and the Department of Defense didn’t respond to a request for comment.”

³⁴ Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011. The primary purpose of the data collected in this survey was to uncover incidents of discrimination against transgender individuals. The estimate of 15,500 was based on a survey sample of 6,456 people who were not currently in military service, and did not distinguish between Active Component and Reserve Component service.

³⁵ Schaefer, Agnes, Radha Iyengar, Kadiyala Srikanth, Charles Engel, Kayla Williams, and Amii Kress. *Assessing the Implications of Allowing Transgender Personnel To Serve Openly*. Santa Monica, CA: RAND Corporation, 2016.

Selected Reserve.³⁶ Based on the number of Active Component and Selected Reserve personnel accounted for in the RAND study, the number of transgender personnel on active duty or in the Selected Reserves is 0.18 percent of the entire military population.³⁷ These numbers are crucial to estimate because a meaningful cost-benefit analysis cannot otherwise be conducted.

One report asserts that DSM-V made a critical change to the way mental health professionals view gender identity issues. The Palm Institute's report noted that the change from gender identity disorder in DSM-IV to gender dysphoria in DSM-V is important because the latter is amenable to treatment, whereas the former is an "all-encompassing mental illness."³⁸ Treatment may be entirely possible, but the report is flawed when it asserts that Service regulations allow commanders "complete discretion to separate transgender individuals without medical review (for the 'convenience of the government')."³⁹ This assertion does not square with Navy regulations governing the authority of commanders to discharge those with borderline personalities or due to physical or mental conditions.⁴⁰ In the Navy, commanders may separate personnel with

³⁶ *Id.*, at 16. Of note, the RAND study relied on surveys from other sources with an adjustment to account for the male/female distribution within the armed forces. The study asserted that the statistical adjustment for a male-dominated profession was warranted based on their underlying research that assumed male-to-female transitions are two to three times more likely than female-to-male transitions.

³⁷ Because the Grant, et. al. survey did not distinguish between Active Component and Reserve Component personnel, it is not possible to determine what percentage of the armed forces consist of transgenders. Additionally, the RAND Corporation estimates were based on Fiscal Year 2014 force information, whereas the Grant survey was conducted in 2011.

³⁸ Dr. Jocelyn Elders and RADM Alan Steinman, MD. Report of the Transgender Military Service Commission. The Palm Center, Mar. 2014. Available at: <http://archive.palmcenter.org/files/Transgender%20Military%20Service%20Report.pdf>

³⁹ *Id.*, p. 4.

⁴⁰ MILPERSMAN 1910-120.

such conditions as: adjustment disorders; incapacitating fear of flying; impulse control disorders; unsanitary habits; and sexual gender and identity disorders paraphilias.⁴¹ Gender identity issues are not treated in their own category in the Navy; personnel may be separated for the convenience of the government for a wide variety of causes mentioned above. The issues must impair a member's performance, but not amount to a disability. In all cases under this provision, however, medical documentation of the disorder is required.⁴²

Removing gender identity issues, gender dysphoria, or transgenderism from the list of service-disqualifying conditions would be an effective way to open the possibility of service in the armed forces for transgender individuals. If executed in concert with a plan to provide required medical and mental health services, transgender service could be supportable even without Supreme Court intervention. Therefore, it may be more desirable to make administrative regulatory changes before resorting to lengthy, costly, and time consuming litigation with a low probability for success. Making regulatory changes first, however, could result in future administrations reversing the revised regulatory scheme, only to return to current policies or more restrictive policies.

POLITICAL ANALYSIS

The main stakeholders in the establishment of a lawful path for transgender service in the armed forces includes: civil rights advocacy groups; lesbian, gay, bisexual, transgender, and queer (LBGTQ) advocacy groups; the DoD and Services of the armed forces; Congress; and the President. Advocacy groups range from traditional civil rights activities such as the American Civil Liberties Union to the Transgender Law Center.

⁴¹ Id.

⁴² Id., sec. 2.c.

The Transgender Law Center played a significant role in the Lusardi case mentioned above and cited in footnote seven to this memorandum. Various federal actors also have a vested interest in how or whether the policy proposal outlined above comes to fruition. As the holders of the purse strings, Congress has a significant stake in the outcome of transgender service litigation as they will have to provide additional funding for facilities and medical services. Similarly, the President has a significant interest in the outcome of litigation because the armed forces are tools of diplomacy for use by the Executive Branch.

The primary stakeholder for this policy proposal, however, is the DoD and its Services. This is so because SECDEF summarily stated the desired end state with respect to transgender service within the armed forces in his 2015 memorandum. One may infer that the decision to research and execute such a change in policy was influenced by at least tacit support by the President or by Congress. The facts are clear that SECDEF acted alone. In fact, he offered no basis for the decision other than a desire to be inclusive with a specific group of citizens who SECDEF deemed to be worthy of service in the armed forces. No data was offered by SECDEF that suggested there is a rate of return that justifies any additional expense to accommodate transgender personnel if they become eligible to serve in the armed forces. Therefore, the DoD and its Services are reasonably considered to be the largest stakeholders should the policy proposal be successful or if it should fail.

SECDEF relied on a RAND Corporation study's assessment of the anticipated costs to the government to maintain a transgender workforce in the military. As reported by the New York Times, the study concluded that the additional cost to serve the medical needs

of transgender personnel would be between \$2.9M and \$4.2M annually.⁴³ The additional costs represent between about 0.05% and 0.07% of the total \$6B cost of medical care for all 1.2M service members.⁴⁴ At first glance, this may appear to be a negligible sum. On a per capita basis, it costs the DoD an average of \$5,000 in medical costs for each service member, transgender and others alike.⁴⁵ The additional costs for the 2,450 transgender service members represents an extra \$1,183 to \$1,714 per transgender service member above what is normally spent on each service member for medical expenses.⁴⁶ These costs could be an increase of more than 35% in medical expenses on a per capita basis for every transgender personnel. Although neither SECDEF nor the article interpreted the additional medical costs as noted in this section, the added expense was dismissed as negligible by SECDEF. SECDEF stated his decision was “a matter of principle.”⁴⁷

Congress is split, predictably, along party lines with Democrats citing basic human rights advancement as the basis for the action, and Republicans calling for additional hearings to assess the long-term implications of transgender service.⁴⁸ Representative Mac Thornberry (R-TX) is focused on the medical readiness and worldwide deployability

⁴³ Schmidt, Michael S. “Study Finds Few Obstacles to Lifting Military’s Transgender Ban.” *New York Times*, 16 May 2016.

⁴⁴ Id.

⁴⁵ Id. The article reported a total cost of \$6B for all 1.2M service members which is \$5,000 per person.

⁴⁶ Id. The article relies on a RAND Corporation study, reporting that 2,450 service members are transgender. The article further reports that the additional expense for transgender members is between \$2.9M and \$4.2M in medical expenses. When calculated on a per capita basis, the additional cost per transgender service member is between \$1,183 and \$1,714, or a maximum of about 35% in additional medical costs over the average for all service members.

⁴⁷ Id.

⁴⁸ Rosenberg, Matthew. “Transgender People Will Be Allowed to Serve Openly in Military.” *New York Times*. 30 Jun. 2016.

of American troops, while Representative Adam Smith (D-WA) is concerned about inclusivity of transgenders among the armed forces.⁴⁹ This divergent set of views can be summarized as the parties' disparate views of social agenda matters on the Democrats' side versus the Republicans' concerns over fiscal and readiness issues that are not fully explored. Democrats are typically forward-leaning in social policy matters, whereas Republicans normally focus on budgetary concerns. Therefore, the political cost for Democrats pursuing a social agenda item could be the expense of bipartisan support from Republicans who perceive a Democrat push that has not properly weighed the risks and expenses of implementation. A more measured approach for Democrats would be soliciting Republican input on how to implement a social policy change that would address Republican concerns over costs. Republicans do not overwhelmingly oppose transgender service. Therefore, Democrats could enhance their political position and even speed the implementation process by slightly reducing the rapid speed of implementation while being more solicitous of practical Republican concerns. Such a demonstration of political inclusion may yield a longer-lasting result for the Democrats' social agenda.

According to a Quinnipiac University poll, 68% of American voters at large are in favor of transgender service in the armed forces while 27% oppose it.⁵⁰ Among Republicans, 60% oppose transgender service, and 32% support it.⁵¹ At about the same time as the Quinnipiac University poll was conducted, a Morning Consult/POLITICO

⁴⁹ Johnson, Chris. "House GOPer Pledges Review in Congress of Trans Military Service." *Washington Blade*. 30 Jun. 2016.

⁵⁰ Malloy, Tim. U.S. Voters Say 68 – 27% Let Transgender People Serve, Quinnipiac University National Poll Finds. Hamden, CT. 3 Aug. 2017.

⁵¹ *Id.*

survey arrived at the same overall rate of support for transgender service.⁵² The same survey found that 78% of Democrats and 54% of Independents support transgender service, while 56% of Republicans disapprove. If these two polls are indicative of the pulse of the nation, it seems clear that the majority of American voters are in favor of transgender service, making the SECDEF policy politically supportable. Despite Republican concerns over fiscal and readiness issues associated with transgender service, a majority of American voters will support SECDEF, Congress, and the President as the transgender policy is implemented.

The most significant risk associated with reliance on the policy proposal as outlined is the amount of time it will take to see it to fruition. Patience and long-term planning are not strong characteristics of American politics and its politicians. From a political point of view, the proponents of the policy change may never be able to cash in on the political capital associated with lasting change. It will take years for a court case to work its way through the state or federal judiciaries. By the time the case is decided by the Supreme Court, more than one Executive administration may have assumed control. American politicians of either party are not readily willing to plant seeds that carry little chance for success and take years to blossom. This inherent risk could be politically fatal to an otherwise solid plan for permanent change. Furthermore, American voters generally require instant gratification. They desire tangible results after electing a public official. Voters will also not likely have the stamina to support this policy proposal.

⁵² Easley, Cameron. "Voters Show Bipartisan Support for Transgender Military Service." *Morning Consult*, 2 Aug. 2017 (available at: <https://morningconsult.com/2017/08/02/transgender-military-poll>, last visited 30 Nov. 2017).

RECOMMENDATION

Administrative change by the DoD and its Services is the only practical solution that will allow transgender service in the armed forces. Despite the significant benefits and permanent change that would result from Article III judicial action as outlined above, it is unlikely that any politician or stakeholder will have the patience to allow this solution to ripen. With no more effort than the stroke of a pen, SECDEF can modify administrative regulations that currently preclude transgender service. This action allows political leaders to claim success for policy changes immediately rather than years down the road. SECDEF may selectively carve out exceptions for new accessions or current service members, or he may remove all barriers without excepting certain provisions of the regulatory guidance. There is no legal basis for the Services to complain or seek a remedy for such an action as it falls entirely within the purview of the President and his SECDEF.

For the same reasons noted above, however, the administrative regulatory changes are not as desirable for a sustained change to a policy allowing transgender service. Each new administration may make the same changes, in part or whole. Given the fact that the current Administration will change in early 2017, there is no way to know what the next administration will do. Moreover, there is so little time for regulatory changes to be made before the next administration assumes control that it will be virtually impossible for any changes to take root. Any change to regulations would not be so pervasive that it would cut against reverting to the original regulatory framework. The unknown political climate in late 2016 acts as a chilling effect for permanent regulatory changes as they could be canceled or reversed in a matter of weeks or months in January of 2017.

Beyond the administrative and regulatory modifications already addressed, there are serious fiscal concerns associated with transgender service. As outlined in the beginning sections of this proposal, the question about which restroom should be used by transgender personnel could have significant fiscal impacts. Aside from the countless shore- and land-based DoD facilities worldwide, aircraft, surface ships, submarines, and many other platforms that have restroom facilities could be implicated and require modification to accommodate transgender personnel. Costs are not easily calculated, suffice to say that changing interior configurations on board warships or aircraft will not result in negligible costs. It is more likely, however, that the Services will merely reallocate use of existing restroom facilities on vessels and aircraft rather than outrig new or additional facilities. This fiscal consideration should not be a driving factor when calculating potential costs to the DoD. Depending on the outcome of new litigation such as the *Lusardi* case, shore- and land-based facility modifications of restrooms could be costly. There are too many unknown factors to predict what those costs would be. Again, it is more likely that existing restroom facilities would be reallocated for dual use rather than forcing the DoD to create new and separate facilities. After all, building separate facilities for transgenders would contradict the underlying rationale of being inclusive with this group of personnel. The DoD should be disinclined to foster any sense that transgenders should be treated differently or be forced to use restroom facilities that are separate and distinct.

Although the majority of this proposal addressed the substance and feasibility of the recommended action, it is crucial to be aware of the tenuous nature of executing this plan at all. Aside from SECDEF's determination that transgenders must be able to serve

openly in the armed forces, there is not a scintilla of data that suggests there is any tangible or intangible reward or benefit derived from transgender service. The intent of SECDEF is purely motivated by an altruistic social agenda that has no basis in scientific or statistical data. As noted in the RAND study, a maximum of 65 personnel per year are estimated to seek transgender transition surgery.⁵³ To put this in perspective, this policy change *may* help a total of 0.0054% of the population in the armed forces—65 people per year. The total number of personnel estimated to currently serve in the armed forces is two-tenths of one percent. Given the human resources alone that have already been expended within the federal government over the issue of transgender service in the armed forces, the policy modification is simply not worth the effort. The sole basis for executing this policy proposal is its underlying social agenda. Whether the manning, training, and equipping of the armed forces is the proper forum for asserting social agenda issues is beyond the scope of this policy proposal. However, prudence must be exercised when considering whether to further expend human and fiscal resources to carry out an administrative modification of the regulatory framework to support transgender service in the armed forces.

⁵³ *Supra*, note 35, p. 20.

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Objective

Continuous pursuit of academic topics that will develop and refine practical skills associated with policymaking at the national level.

Skills & Abilities

- Licensed to practice law in District of Columbia, Indiana, Court of Appeals for the Armed Forces, and Supreme Court of the United States.
- Judge Advocate in the U.S. Navy, certified under Art. 27(b) and sworn under Art. 42(a) of the Uniform Code of Military Justice.
- International transportation specialist

Experience

Judge Advocate — U.S. Navy

August 2008 —
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General attorney with 10 years of experience in personnel law, financial disclosure, government ethics, fiscal law, contract law, legislative proposals, operational and international law, military justice, and administrative law.

Managing Director — Expo Logistics Associates LLC

Owner and operator of a non-asset based international transportation company specializing in the global movement of cargo intended for trade shows and exhibitions.

Vice President — ShowFreight International

International transportation of exhibition goods via sea, air, and land, including temporary customs clearance.

Education

The Judge Advocate General's Legal Center & School — Master
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Specialization in fiscal and contract law

Salmon P. Chase College of Law — Juris Doctor, Highland Heights, KY

July 2004 — May 2008

The George Washington University — Bachelor of Arts in East Asian Studies, Washington, DC
Minor in Chinese Language & Literature

August 1989 — May 1993

Communication

- Routine briefing to Flag and General Officers on matters of military justice, government ethics, operational law, and fiscal matters.
- Frequently argued motions and tried criminal cases in the military justice court system.
- Published an article while attending The Judge Advocate General's Corps Legal Center & School.

Leadership

- Current tour in the U.S. Navy is a department head on the USS GERALD R. FORD (CVN 78), the U.S. Navy's newest aircraft carrier of 2,700 personnel. In addition to providing legal advice to the Commanding Officer of the ship, the Command Judge Advocate is the supervisory attorney for one judge advocate and five enlisted members in the Legalman rating.
- Owned or operated as a vested partner two start-up businesses in the international transportation industry starting from the age of 27.